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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 276.

THE UNITED STATES, APPELLANT,

v.

JOHN M. HITE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR JOHN M. HITE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24342

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Statement.

The facts and issue are correctly stated in the brief filed by the Assistant Attorney-General.

ARGUMENT.

It must be kept in mind that war with Spain began April 21, 1898, and that the appellee was appointed an officer in the Navy by authority of the act of Congress passed May 4, 1898, his appointment having been made May 14, 1898. The act of May 4, 1898, so far as pertinent, provides as follows:

> "Whenever within the next twelve months, an exigency may exist which, in the judgment of the

> President, renders their services necessary, he is hereby authorized to appoint from civil life and commission such officers of the line and staff, not above the rank or relative rank of commander, and warrant officers, including warrant machinists, and such officers of the Marine Corps not above the rank of captain, to be appointed from the non-commissioned officers of the corps and from civil life, as may be requisite:
>
> "*Provided,* That such officers shall serve only during the continuance of the exigency under which their services are required in existing war."

The war with Spain terminated at the time of the signing of the Treaty of Paris, December 10, 1898, if not before. The appellee served under his appointment until December 17, 1898, at which time he was detached from the vessel on which he had served and ordered home. He was honorably discharged five days thereafter.

Hite was appointed under the act of May 4, 1898, because an exigency existed which rendered his "*services* necessary." Considering the short time that elapsed between the date of his detachment and the date of his discharge, and considering the fact that the war with Spain was at an end at the time of his detachment, it is a fair presumption that the law of May 4, as embodied in its proviso, was being carried out, and that on December 17, so far as the appellee was concerned, the exigency which rendered his *services* necessary ended. But why detach him and send him home without at once discharging him? There can be no other valid reason assigned, under the conditions existing, than that the authorities deemed it reasonable that the United States should pay the expenses of his journey home and for his time in getting there, and this could be done only by discharging him after his arrival home.

It is clearly obvious that the act of May 4, 1898, contemplated the appointment of naval officers from civil life for *active* service, and it just as clearly contemplated that when

the active service of each appointee should no longer be necessary by reason of the exigency produced by the war with Spain, that he should be discharged.

The act under which the question at issue arises was passed March 3, 1899, more than two months after Hite was discharged, and also after many other of the officers appointed under the act of May 4, 1898, were discharged. The act of March 3 provides as follows:

> "The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

Here again it appears to be plain that Congress was appropriating extra pay for active services. In the case of both the one month's and two months' extra pay it was made necessary that to be a beneficiary the officer must have *served* creditably. He was appointed for the purpose of active service and active service was the basis for extra pay.

In his brief the Assistant Attorney-General says:

> "It is true that the claimant was in the kind of service for which smaller rate of pay is granted the short period of five days. But this fact does not interfere with the principle. Had he continued in service 'on leave or waiting orders pay' from the time he was detached from the *Massachusetts* for a period of several months he would have been entitled to compensation at the rate of $1,000 per year, and at the end of a year or any other period of such service, if discharged, he would have as much right or reason to contend for the two months' extra pay based on his *former sea pay* as he has for the present contention."

The Assistant Attorney-General is supposing a condition that could not have occurred under the law. The Navy Department was obliged under the proviso of the act of May 4, 1898, to discharge the officers appointed thereunder when their services were no longer required in connection with the war with Spain. The fact that the claimant was detached from active service only five days before his discharge tends strongly to show that when detached it was because his services were no longer required, and was preparatory to his discharge on his arrival home. In other words, it seems almost a necessary conclusion that the detaching order was the preliminary step to a severance of the claimant's connection with the Navy, and that it was the expression of the Department that his services were no longer necessary, and that, under the proviso to the act of 1898, it became the Department's duty to discharge him.

In this connection it may not be amiss to call attention to a statement of the Assistant Attorney-General near the end of his brief. He says:

> "This is what is commonly termed as a 'class' case, and it is one of the most favorable of the class for the claimants."

There was no exercise of choice in bringing the suit for the reason suggested. The claimant was the first of the "class" who consulted with counsel, and it was upon the facts of his case that an opinion was given by counsel that the law had been erroneously construed by the accounting officers of the Treasury to his detriment. This reason alone governed in the choice of the case to be presented.

The Assistant Attorney-General probably means by his statement to convey the idea that most other cases of the class show that there was a longer time between detachment and discharge than five days, as in the claimant's case, and that therefore the bulk of cases do not indicate that the detachment was merely preliminary to the discharge and with the

discharge in view. If so, the answer is that in every case which has been examined by claimant's counsel the discharge followed the detachment order as soon as the officer reported his arrival at home, as required to do by the order. If detached at a port of the United States, the time between the detachment and the discharge on arriving home was always shorter than when the detachment was made in the Philippines or in foreign ports. The point is that the rule practiced in detaching and discharging warrants the conclusion that it was based on the intention to discharge when the detachment was made. In this connection attention is called to the wording of the detaching order:

"NAVY DEPARTMENT,
"WASHINGTON, D. C., *Dec.* 12, 1898.

"SIR: You are hereby detached from duty on board the U. S. S. 'Massachusetts,' and will proceed to your home.

"Immediately upon your arrival report your local address in full to the Bureau of Navigation, Navy Department, Washington, D. C. See article 224, U. S. Navy Department, 1896.

"Report also the date of your detachment, and inform the Department of the status of your accounts, and whether you are indebted to the Government by reason of advances drawn by you.

"Respectfully, JNO D. LONG, *Secretary.*

"Assistant Engineer JOHN M. HITE,
"U. S. N., U. S. S. Massachusetts."

It is to be observed that the order simply detaches the claimant and orders him to his home, without a word to indicate that on arrival home he is to hold himself "on waiting orders" or in readiness for future assignment to duty. Counsel is informed that orders detaching officers and ordering them home invariably contained directions as to future duties when future duties are contemplated. As an illustration, take the following order, taken at random, embodied

in the opinion of this court in the case of United States *v.* Thomas, 195 U. S., 418:

> "SIR: You are hereby detached from duty in command of the U. S. T. S. *Lancaster,* will proceed immediately to Washington, D. C., and report at Navy Department, at that place, for special temporary duty. Hold yourself in readiness for orders to sea duty. This employment on shore duty is required by the public interest."

It is further to be observed that the claimant here is specifically ordered to inform the Department of the status of his accounts and whether he is indebted to the Government by reason of advances drawn by him, which, it is submitted, indicates that claimant's account with the Government was about to be settled, preparatory to the serverance of his employment as an officer of the Navy.

The Government's contention and that adopted by the Comptroller and the dissenting opinion of the Court of Claims is that this case is governed by this court's decision in the case of United States *v.* North (112 U. S., 510), and that the rule of that case decides this one against the claimant. The learned judge who delivered the dissenting opinion says at the outset thereof that he regretted his inability to concur in the opinion of the court in favor of the claimant, for the reason that it appeared to him inequitable not to do so, and he says further on that he had examined carefully the facts in the North case because it seemed to him harsh and apparently unjust to the claimant in this case that he should be detached from his ship when he was drawing pay at the rate of $1,700 per annum and ordered to his home to be discharged from the public service, and five days thereafter to be discharged and to be paid at the rate of only "waiting orders" pay—$1,000 a year, and that equity seemed to demand that he should have been paid at the rate of $1,700 per annum, because his entire enlistment and service was on "sea duty" And, again, further on, after concluding

that the rule in the North case compelled him to hold against the claimant's contention, he says:

> "If this were a matter of first impression the exceptional circumstances which the court thinks should bring this case within the spirit of the statute might prevail."

It is respectfully submitted that the learned justice who penned the dissenting opinion is in error in supposing that this court's decision in the North case compelled him, against his independant judgment, to the conclusion which he reached.

In the North case two questions arose:

First. Whether officers of the Navy and Regular Army who were employed in the prosecution of the war with Mexico were entitled to the three months' extra pay provided for by the acts of Congress of 1848 and 1879.

Second. If so, at what rate of pay they were entitled.

The first question was decided in the affirmative, and it is not involved here.

The following is the language of the act of 1848, so far as it bore on a solution of the second question:

> "That the officers, &c., engaged, &c., in the war with Mexico and who served out the time of their engagement, or may have been honorably discharged, shall be entitled to receive three months' extra pay."

North was a lieutenant in the Navy at the outset of the war with Mexico. He served in that war on board the frigate *Potomac,* as one of that vessel's complement of officers, until July, 1847, when the vessel sailed for the United States, and he was still an officer thereon.

In considering the question as to the rate of pay, this court said:

> "Those of the Regular Army or Navy who were 'engaged in the military service of the United States in the war with Mexico' may be said to 'have served out the term of their engagement,' or to have been 'honorably discharged,' *within the meaning of those terms as used in the act of 1848*, when the war was over, or when they were ordered or mustered out of that service."

This seems to indicate that this court, in construing the act of 1848, was impressed with the idea that Congress intended extra pay as if additional service in the war had been given in point of time, and that it attached little importance to the phraseology of the act as tending to limit that main intent. This idea is further enforced by the following language of the court:

> "The language (of the act) is, 'shall be entitled to receive three months' extra pay,' evidently meaning the *same pay they would have received if they had remained in the same service three months longer.*"

The language of the act of 1848 is, "shall be entitled to receive three months extra pay." The language of the act of 1899 is, "shall be paid two months extra pay." It is difficult to see how the language of the former act evidently means to give the officers as extra pay the same pay they would have received if they had remained in the same service three months longer, and that the language of the latter act means just the contrary.

In this connection attention is called to the fact that the act of 1848 used the term "honorably discharged," but that the act of 1899 omits the word "honorably." The latter act gives the pay even if the officer should be dishonorably discharged, provided he "served creditably" in the war with Spain. Actual and creditable service was made the basis for the extra pay and is the controlling idea in seeking to discover the intention of Congress as to the rate of extra pay. Moreover, if the rate is based on the idea that Congress in-

tended to give service pay, it affords a fixed measure for computing the pay. But if the Government's contention is correct, then Congress left it to the Department of the Navy to determine the rate at which all officers appointed under the act of 1898 still in office when the act of March 3, 1899, was passed, should be paid. The Department could have discharged one officer without ordering him home and another after ordering him home, and thus pay them at different rates.

It is somewhat curious that the Government is urging in support of its view for a narrow technical construction of the act of 1899 the ruling in the North case, which held against the narrow and technical construction of the act of 1848, as therein contended for by the Government. The spirit of the North decision was clearly in favor of a liberal construction of the act of 1848 in favor of the beneficiaries thereunder, which is all that is contended for here in support of the decision of the Court of Claims in its construction of the act of 1899.

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